Updated Informative Digest for

Adoption of Proposed Amendments to California Code of Regulations,

Title 18, Section 1684, *Collection of Use Tax by Retailers*

On May 30, 2012, the State Board of Equalization (Board) held a public hearing on and unanimously voted to adopt the original text of the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1684, *Collection of Use Tax by Retailers*, described in the notice of proposed regulatory action. There have not been any changes to the applicable laws or the effect of the adoption of the proposed amendments to Regulation 1684 described in the informative digest included in the notice of proposed regulatory action. The Board received written comments from Mr. Albin C. Koch regarding the proposed amendments to Regulation 1684. Also, Mr. Koch and Mr. Fran Mancia appeared at the public hearing on May 30, 2012, and commented on the proposed amendments. Mr. Koch's and Mr. Mancia's comments are summarized and responded to below and in the final statement of reasons.

The informative digest included in the notice of proposed regulatory action provides:

"Existing Federal Law Regarding the Collection of State Use Tax

"Article I, section 8, clause 3 of the United States Constitution expressly authorizes the United States Congress to 'regulate Commerce with foreign Nations, and among the several States' (Commerce Clause). In *Quill Corporation v. North Dakota* (1992) 504 U.S. 298, the United States Supreme Court explained that:

- The Commerce Clause grants Congress affirmative legislative authority and, by its own force, prohibits certain state actions that interfere with interstate commerce (*Id.* at p. 309);
- Subject to Congress's legislative authority, the Commerce Clause prohibits a state from requiring a retailer engaged in interstate commerce to collect the state's use tax unless the retailer has a 'substantial nexus' with the state (see *id*. at p. 311);
- In the absence of congressional action, the bright line rule, established in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois* (1967) 386 U.S. 753, that a retailer must have a 'physical presence' in a taxing state in order for that state to impose a use tax collection obligation on the retailer is still applicable today (see *id*. at pp. 317-318); and
- *National Bellas Hess* interpreted the Commerce Clause as establishing a 'safe harbor' prohibiting a state from requiring a retailer to collect that state's use tax if the retailer's only connection with customers in the state is by common carrier or the United States mail, which, in the absence of congressional action, is still applicable today (see *id*. at p. 315).

"Further, the United States Supreme Court has historically agreed that the safe harbor established in *National Bellas Hess* (and reaffirmed in *Quill*) is limited and does not apply when a retailer's 'connection with the taxing state is not exclusively by means of the instruments of interstate commerce.' (*National Geographic Society v. California Board of Equalization* (1977) 430 U.S. 551, 556 [quoting from and affirming the California Supreme Court's decision in *National Geographic Society v. State Board of Equalization* (1976) 16 Cal.3d 637, 644].) The United States Supreme Court has specifically found that the safe harbor does not apply to an out-of-state retailer that has established a place of business in the taxing state, even if the retailer's in-state business activities are unrelated to the retailer's sales of tangible personal property to customers in that state. (*Id*. at p. 560.) The United States Supreme Court has specifically explained that the safe harbor does not apply if a retailer attempts to negate its connection with a taxing state by organizing itself or its activities in such a way as to 'departmentalize' its connection with the taxing state so that the connection is isolated from the retailer's obvious selling activities. (*Id*. at pp. 560-561.) This is so regardless of whether the connection involves an in-state person who may be characterized as an employee, agent, representative, salesperson, solicitor, broker, or independent contractor, and regardless of whether the activities creating the connection are directly related to the retailer's sales of tangible personal property to customers in the state. (*Ibid*.; see also *Scripto, Inc. v. Carson Sheriff* (1960) 362 U.S. 207, 211-212.) The United States Supreme Court has also specifically found that the safe harbor does not apply if a retailer has 'property within [the taxing] State.' (*National Geographic Society, supra*, 430 U.S. at p. 559 [quoting *National Bellas Hess*].)

"In addition, the California Supreme Court previously held that 'the slightest [physical] presence' in California would be sufficient to create a substantial nexus between a retailer and this state. (*National Geographic Society, supra*, 16 Cal.3d at p. 644.) However, the United States Supreme Court did not agree with the California Supreme Court's slightest presence standard on appeal (*National Geographic Society, supra*, 430 U.S. at p. 556); and the United States Supreme Court subsequently held that a retailer did not have a substantial nexus with a taxing state solely because the retailer licensed a few customers to use software on a few floppy disks located within the taxing state. (*Quill, supra*, 504 U.S. at p. 315, fn. 8.) (The initial statement of reasons contains a more detailed discussion of federal and state case law regarding substantial nexus.)

"<u>Current California Law Regarding the Collection of Use Tax</u>

"Currently, RTC sections 6203 and 6226 collectively require a 'retailer engaged in business in this state' to register with the Board and collect California use tax from its California customers. Also, RTC section 6204 makes a retailer personally liable for any California use tax it fails to collect from its California customers, as required by section 6203. Regulation 1684 requires '[r]etailers engaged in business in this state as defined in Section 6203' to register with the Board, collect California use tax from their California customers, and remit the use tax to the Board. The regulation also provides that retailers are liable for California use taxes that they fail to collect from their customers and remit to the Board, as required.

"Currently, the operative provisions of RTC section 6203, subdivision (c)(1) through (3), define the term 'retailer engaged in business in this state' by providing that:

> 'Retailer engaged in business in this state' as used in this section and Section 6202 means and includes any of the following:
> (1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.
> (2) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.
> (3) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

"The current operative provisions of section 6203, subdivision (d)(1), address the taking of orders over the Internet by providing that:

> For purposes of this section, 'engaged in business in this state' does not include the taking of orders from customers in this state through a computer telecommunications network located in this state which is not directly or indirectly owned by the retailer when the orders result from the electronic display of products on that same network. The exclusion provided by this subdivision shall apply only to a computer telecommunications network that consists substantially of online communications services other than the displaying and taking of orders for products.

In addition, the current operative provisions of section 6203, subdivision (e), provide that a retailer is not a 'retailer engaged in business in this state' if that retailer's 'sole physical presence in this state' is to engage in limited convention and trade show activities, as specified.

"Currently, Regulation 1684 does not define the full scope of the phrase 'retailer engaged in business in this state,' as defined in RTC section 6203. Instead, Regulation 1684, subdivision (a), provides, in relevant part, the following guidance regarding the meaning of the phrase 'retailer engaged in business in this state,' as currently defined by section 6203, subdivisions (c) and (d):

> Any retailer deriving rentals from a lease of tangible personal property situated in this state is a 'retailer engaged in business in this state' and is required to collect the tax at the time rentals are paid by his lessee.

> The use of a computer server on the Internet to create or maintain a World Wide Web page or site by an out-of-state retailer will not be considered a factor in determining whether the retailer has a substantial nexus with California. No Internet Service Provider, On-line Service Provider, internetwork communication service provider, or other Internet access service provider, or World Wide Web hosting services shall be deemed the agent or representative of any out-of-state retailer as a result of the service provider maintaining or taking orders via a web page or site on a computer server that is physically located in this state.
>
> A retailer is not 'engaged in business in this state' based solely on its use of a representative or independent contractor in this state for purposes of performing warranty or repair services with respect to tangible personal property sold by the retailer, provided that the ultimate ownership of the representative or independent contractor so used and the retailer is not substantially similar. For purposes of this paragraph, 'ultimate owner' means a stock holder, bond holder, partner, or other person holding an ownership interest.

Currently, Regulation 1684, subdivision (b), also incorporates the current provisions of section 6203, subdivision (e), regarding convention and tradeshow activities.

"RTC Section 6203 as Amended by AB 155

"RTC section 6203, subdivision (c), as amended by AB 155, will define the term 'retailer engaged in business in this state' more broadly then current section 6203, subdivision (c), and provide that the term means 'any retailer that has substantial nexus with this state for purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty.'

"RTC section 6203, subdivision (c)(1) through (3), as amended by AB 155, will provide that the term 'retailer engaged in business in this state' specifically includes, but is not limited to, retailers engaged in the activities described in current section 6203, subdivision (c)(1) through (3) (quoted above). Subdivision (c)(4), as added to section 6203 by AB 155, will further provide that 'retailer engaged in business in this state' specifically includes, but is not limited to, any retailer that is a member of a 'commonly controlled group,' as defined in RTC section 25105, and is a member of a 'combined reporting group,' as defined by the Franchise Tax Board (FTB) in Regulation 25106.5, subdivision (b)(3), 'that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer . . . .'

"In addition, subdivision (c)(5)(A), as added to RTC section 6203 by AB 155, will provide that the term 'retailer engaged in business in this state' specifically includes, but is not limited to '[a]ny retailer entering into an agreement or agreements under which a

person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise,' but only if: (1) 'The total cumulative sales price from all of the retailer's sales, within the preceding 12 months, of tangible personal property to purchasers in this state that are referred pursuant to all of those agreements with a person or persons in this state, is in excess of ten thousand dollars ($10,000)'; and (2) 'The retailer, within the preceding 12 months, has total cumulative sales of tangible personal property to purchasers in this state in excess of one million dollars ($1,000,000).'

"However, subdivision (c)(5)(B), as added to RTC section 6203 by AB 155, will provide that: 'An agreement under which a retailer purchases advertisements from a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any other medium, is not an agreement described in subparagraph (A), unless the advertisement revenue paid to the person or persons in this state consists of commissions or other consideration that is based upon sales of tangible personal property.' Subdivision (c)(5)(C), as added to section 6203 by AB 155, will provide that: 'Notwithstanding subparagraph (B), an agreement under which a retailer engages a person in this state to place an advertisement on an Internet Web site operated by that person, or operated by another person in this state, is not an agreement described in subparagraph (A), unless the person entering the agreement with the retailer also directly or indirectly solicits potential customers in this state through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state.' Subdivision (c)(5)(D), as added to section 6203 by AB 155, will provide that for purposes of paragraph (c)(5), 'retailer' includes 'an entity affiliated with a retailer within the meaning of Section 1504 of the Internal Revenue Code.' Also, subdivision (c)(5)(E), as added to section 6203 by AB 155, will provide that paragraph (c)(5) 'shall not apply if the retailer can demonstrate that the person in this state with whom the retailer has an agreement did not engage in referrals in the state on behalf of the retailer that would satisfy the requirements of the commerce clause of the United States Constitution.'

"Finally, it should be noted that the amendments made to RTC section 6203 by AB 155 will also delete the provisions in current section 6203, subdivision (d), regarding the 'taking of orders from customers in this state through a computer telecommunications network,' and renumber current section 6203, subdivision (e)'s provisions regarding convention and tradeshow activities as section 6203, subdivision (d).

"The amendments made to RTC section 6203 by AB 155 will become operative on September 15, 2012, if a federal law is not enacted on or before July 31, 2012, authorizing the states to require a seller to collect taxes on sales of goods to in-state purchasers without regard to the location of the seller. If a federal law is enacted on or before July 31, 2012, authorizing the states to require a seller to collect taxes on sales of goods to in-state purchasers without regard to the location of the seller, and the state does not, on or before September 14, 2012, elect to implement that law, the amendments made to section 6203 by AB 155 will become operative on January 1, 2013.

"Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1684

"Board staff conducted meetings with interested parties on October 31 and December 20, 2011, in Sacramento, California, and November 2 and December 22, 2011, in Culver City, California, to discuss the effect of the amendments made to RTC section 6203 by AB 155 and how to best amend Regulation 1684 to make it consistent with the amendments to section 6203, implement the new provisions that were added to RTC section 6203 regarding 'substantial nexus,' 'commonly controlled group nexus,' and 'affiliate nexus,' and provide notice to retailers that AB 155 will require retailers to register to collect California use tax if they have a 'substantial nexus' with California.

"After discussing AB 155 with the interested parties and reviewing the interested parties' comments, Board staff recommended that the Board amend Regulation 1684 to:

- Incorporate the new provisions of RTC section 6203, subdivision (c), as amended by AB 155, providing that 'retailer engaged in business in this state' means 'any retailer that has substantial nexus with this state for purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty,' and incorporate the non-exhaustive examples of retailers with substantial nexus set forth in section 6203, subdivision (c)(1)-(5), as amended by AB 155, including the examples regarding commonly controlled group nexus and affiliate nexus;
- Incorporate the physical presence test established in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois* (1967) 386 U.S. 753 (and affirmed in *Quill Corporation v. North Dakota* (1992) 504 U.S. 298) by creating a presumption that a retailer is engaged in business in this state if the retailer has any physical presence in California, and further explain that a retailer may rebut the presumption if the retailer can substantiate that its physical presence is so slight that the United States Constitution prohibits this state from imposing a use tax collection duty on the retailer, that a retailer does not have a physical presence in California solely because the retailer engages in interstate communications with customers in California via common carrier, the United States mail, or interstate telecommunication, including, but not limited to, interstate telephone calls and emails, and that the rebuttable presumption does not apply to a retailer that does not have a physical presence in California;
- Clarify that services are performed in connection with tangible personal property to be sold by a retailer, within the meaning of section 6203, subdivision (c)(4)'s new commonly controlled group nexus provisions, if the services help the retailer establish or maintain a California market for sales of tangible personal property, and clarify that services are performed in cooperation with a retailer, within the meaning of section 6203, subdivision (c)(4), as added by AB 155, if the retailer and the member of the retailer's commonly controlled group performing the services are working or acting together for a common purpose or benefit;

- Clarify that the phrases ‘commission or other consideration’ and ‘commissions or other consideration that is based upon sales of tangible personal property,’ as used in section 6203, subdivision (c)(5)’s new affiliate nexus provisions, refer to any ‘consideration that is based upon completed sales of tangible personal property, whether referred to as a commission, fee for advertising services, or otherwise’;
- Clarify that the determination as to whether a retailer has made the requisite amount of sales to purchasers in California during the preceding 12 month period to be engaged in business in California under section 6203, subdivision (c)(5)’s new affiliate nexus provisions shall be made at the end of each calendar quarter;
- Clarify that, for purposes of section 6203, subdivision (c)(5)’s new affiliate nexus provisions, an individual is in California when the individual is physically present within the boundaries of California and a person other than an individual is in California when there is at least one individual physically present in California on the person’s behalf, and further clarify that the affiliate nexus provisions do not apply to a retailer’s agreement with any person, unless an individual solicits potential customers under the agreement while the individual is physically present within the boundaries of California;
- Create a means by which a retailer may effectively establish that its agreement is not the type of agreement that can give rise to affiliate nexus under section 6203, subdivision (c)(5), by utilizing contractual terms and factual certifications; and expressly excuse retailers from the requirement to obtain a certification if the person from whom the certification is required is dead, lacks the capacity to make such certification, or cannot reasonably be located by the retailer and there is no evidence to indicate that such person did in fact engage in any prohibited solicitation activities in California at any time during the previous year;
- Define the terms ‘advertisement,’ ‘solicit,’ and ‘solicitation’ for purposes of applying the new affiliate nexus provisions of section 6203, subdivision (c)(5) by focusing on the general and broad nature of advertising and the more actively targeted nature of soliciting;
- Define the term ‘person’ by reference to the definition of ‘person’ set forth in RTC section 6005 and define the term ‘individual’ to mean a ‘natural person’ for purposes of applying the new affiliate nexus provisions of section 6203, subdivision (c)(5);
- Provide three examples illustrating the application of the new affiliate nexus provisions of section 6203, subdivision (c)(5);
- Recognize that a retailer may establish a substantial nexus with California by having its property, including a computer server, in this state; and
- Provide that the amendments made to Regulation 1684 to implement the nexus-expanding provisions of AB 155 will become operative when new section 6203 becomes operative on September 15, 2012, or January 1, 2013, and shall not have a retroactive effect.

"During its February 28, [2012],[1] Business Taxes Committee meeting, the Board determined that staff's recommended amendments are reasonably necessary to accomplish the objectives of making Regulation 1684 consistent with the amendments made to RTC section 6203 by AB 155, implementing and clarifying the new provisions that were added to section 6203 regarding 'substantial nexus,' 'commonly controlled group nexus,' and 'affiliate nexus,' and providing notice to retailers that they will be required to register to collect California use tax if they have a 'substantial nexus' with California once the amendments made to section 6203 by AB 155 become operative. (The interested parties process and February 28, [2012], meeting are discussed in more detail in the initial statement of reasons.) The proposed amendments are anticipated to provide the following specific benefits:

- Ensure that Regulation 1684 is consistent with the amendments made to section 6203 by AB 155 when the amendments made to section 6203 become operative;
- Ensure that the amendments made to section 6203 by AB 155 are interpreted and administered consistently with United States Supreme Court and California court opinions regarding substantial nexus, including, but not limited to, *National Bellas Hess*, *Quill*, S*cripto*, and *National Geographic Society*;
- Ensure that section 6203's new affiliate nexus provisions will be interpreted and administered consistently;
- Provide guidance to retailers as to whether their activities create a 'substantial nexus' with California and require them to register with the Board to collect use tax; and
- Provide more certainty to retailers regarding their new use tax collection obligations before the amendments made to section 6203 by AB 155 becomes operative.

"The Board has performed an evaluation of whether the proposed amendments to Regulation 1684 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1684 is the only state regulation prescribing retailers' obligations to collect California use tax. In addition, there is no federal use tax and there are no comparable federal regulations or statutes to Regulation 1684."

Written Public Comments

The Board received written comments regarding the proposed amendments to Regulation 1684 from Mr. Albin C. Koch, via a letter dated May 29, 2012. In his written comments, Mr. Koch recommended that the Board "consider expanding the rebuttable presumption in proposed Regulation 1684 (b) to recognize that all, or at least most, large remote

[1] The informative digest contained in the notice of proposed regulatory action incorrectly referred to a February 28, 2011, Business Taxes Committee meeting, instead of the February 28, 2012, Business Taxes Committee meeting where the Board voted to propose the amendments to Regulation 1684, as noted in notice of correction posted on May 29, 2012, and the final statement of reasons. The typographical errors in the informative digest have been corrected in the updated informative digest.

retailers selling to California purchasers via the internet, catalogs, or telephonically do so via 'sales on approval' under which, in accordance with present regulation 1628 (b) (3) (D), they continue to own the goods being sold until after their delivery to and acceptance by California purchasers. Thus, at least such large remote retailers should be considered to have substantial physical presence and 'substantial nexus' within the state of California and therefore be liable to collect and remit use tax from their purchasers in accordance with RTC § 6203, as amended by AB 155." Mr. Koch also recommended that the Board add the following sentence to the end of proposed Regulation 1684, subdivision (b)(3):

> A retailer will be regarded as having a physical presence in California if it makes substantial sales to California purchasers that constitute "sales on approval" within the meaning of existing Regulation 1628 (b)(3)(C).

Public Hearing

On May 30, 2012, the Board held a public hearing regarding the adoption of the proposed amendments to Regulation 1684. Mr. Koch appeared at the public hearing and expressed his full support for the Board's proposed amendments, and the (above) sentence Mr. Koch recommended adding to the regulation. He also explained that a remote seller making a sale on approval to a California customer still owns the property at the time it is delivered in California, and that, in his opinion, this could create substantial nexus for a large retailer.

Commercial Code section 2326 defines the term sale on approval narrowly and explains that the delivery of goods to a consumer is a sale on approval only if the consumer has the right to return the goods, even if they conform to the contract. Further, the California Court of Appeal has held that "the general presumption runs against a delivery to a consumer as being a sale on approval" and that the fact that an industry accepts returns does not convert "ordinary retail sales contracts into 'sales on approval.'" (*Wilson v. Brawn of California, Inc.* (2005) 132 Cal.App.4th 549, 558.) Instead, the Court of Appeal has held that section 2326 only "addresses transactions where the parties intend the goods in question to continue to be the seller's property after the buyer takes possession of them . . . " and the purpose of a sale on approval is to give the buyer the ability to "use the goods" and the "option to purchase" the goods after a reasonable period of time. (*Ibid.*)

During the May 30, 2012, public hearing, Board staff expressed its opinion that it is not necessary for the Board to specifically address sales on approval in Regulation 1684 because the Board's Legal Department does not believe that out-of-state retailers are making significant amounts of sales on approval to California customers due to the nature of such sales. Board staff expressed its opinion that the sentence Mr. Koch recommended adding to Regulation 1684 might create confusion, rather than clarify the regulation or aid in the Board's administration of the proposed amendments, because:

- The Board's Legal Department does not agree that an out-of-state retailer that makes a sale on approval to a California customer necessarily has a substantial nexus with California; and
- Adding the suggested sentence to Regulation 1684 would create the inference that retailers making sales on approval to California customers have a substantial nexus with California and are therefore required to register to collect California use tax.

Board staff also explained that the rebuttable presumption being added to Regulation 1684, subdivision (b)(2) applies to all retailers with a physical presence in California and the Board can determine whether a retailer that is actually making sales on approval to California customers has a physical presence in and/or a substantial nexus with California if and when the issue is actually raised.

In addition, Mr. Fran Mancia appeared at the May 30, 2012, public hearing on behalf of MuniServices, LLC, and expressed support for the adoption of the Board's proposed amendments to Regulation 1684 and the collaborative interested parties process that produced the proposed amendments.

At the conclusion of the May 30, 2012, public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1684 without any changes. No other interested parties submitted written comments regarding the proposed amendments to Regulation 1684 and no other interested parties asked to speak at the public hearing.